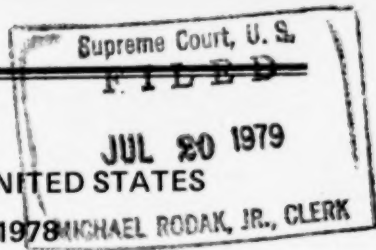


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978



Case No. 78-1882

BENSON A. WOLMAN, et al.,

Appellants,

vs.

FRANKLIN B. WALTER, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Ohio, Eastern Division

MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

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Defendants-appellees, Franklin B. Walter, Superintendent of Public Instruction; the State Board of Education; Gertrude W. Donahey, Treasurer of Ohio; and Thomas E. Ferguson, Auditor of Ohio (the state defendants herein), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move to dismiss the appeal from or, in the alternative, affirm the judgment of the District Court.

QUESTIONS PRESENTED

1. Whether a taxpayer may invoke the jurisdiction of this Court to resolve a dispute in which he has no financial interest.
2. Whether it is an abuse of discretion for a trial court to refuse to issue a mandatory injunction to compel state officials to obtain possession of instructional materials and equipment and turn them over to local school districts where such local school districts have shown no interest in such materials and equipment.

STATEMENT OF THE CASE

On February 1, 1978, the three-judge District Court, pursuant to the mandate of this Court, declared unconstitutional those portions of Section 3317.06(B) providing for the loan of instructional materials and equipment and transportation for field trips. It enjoined the expenditure of state funds for, and the continuation or implementation of, those programs. The remaining portions of the statute were declared constitutional. A copy of the Order is set forth in the Jurisdictional Statement at A-5.

The plaintiffs filed a motion for a mandatory injunction compelling the Board of Education of the City School District of Columbus, Ohio, and the state defendants to recover possession of the instructional materials and equipment presently on loan pursuant to the statute and restore possession to the local boards of education.

The District Court, by Order filed March 21, 1979, denied the motion. A copy of the Opinion and Order is set forth in the Jurisdictional Statement at A-1.

MOTION TO DISMISS

The state defendants move to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III.

Plaintiffs allege that standing is established under *Flast v. Cohen*, 392 U.S. 83 (1968). In that case this Court explained that under certain circumstances a taxpayer may have standing to challenge governmental conduct. In order to do so, the taxpayer must establish a logical connection between both his status as a taxpayer and the challenged conduct and his status as a taxpayer and the nature of the constitutional infringement. *Ibid.* at 102-103.

Plaintiffs are unable to make such a showing in this appeal. There is no connection between their status as taxpayers and the question of who has the right to possession of the instructional materials and equipment. Plaintiffs do not even allege that they will be forced to assume an increased tax burden if the requested relief is denied. Compare *Warth v. Seldin*, 422 U.S. 490, 508-509 (1975). Such a claim would be foreclosed as a matter of law. Any funds which might be derived from such materials and equipment could not be used to lower taxes for the support of public schools. Such funds may only be used to provide special programs for students in non-public schools. Section 3317.06 of the Ohio Revised Code.

The state defendants submit that this appeal is similar to, and should be controlled by, *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case the plaintiff was a taxpayer who challenged the validity of a statute providing for Bible reading in public schools. This Court dismissed the appeal for lack of jurisdiction, since the taxpayer had no financial interest in the challenged conduct.

A taxpayer's action can meet this test, [case or controversy] but only when it is a good-faith pocket book action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is

threatened to be injured by the unconstitutional conduct. We find no such direct and particular financial interest here. *Ibid.* at 434-435.

Plaintiffs in their Complaint also allege that they are citizens. The complaints of citizens concerning the way their government is conducted are generally not sufficient to create a case or controversy. Where the asserted injury is a generalized harm, shared by all or a large class of citizens, and there is no express statutory right of action, that injury will not warrant the exercise of jurisdiction. *Warth v. Seldin*, *supra*, 422 U.S. at 499; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 180 (1974).

MOTION TO AFFIRM

The state defendants, in the alternative, move that the judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

The District Court, in an attempt to follow the direction of this Court in *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973); and *New York v. Cathedral Academy*, 434 U.S. 125, 129 (1977), to incorporate a "blend of what is necessary, what is fair, and what is equitable," balanced the competing interests involved and found that the request for injunctive relief should be denied.

It pointed out that the denial of such relief would result in only minimal impairment of constitutional interests. The instructional materials and equipment involved are subject to eventual obsolescence. Thus the risk of any further benefit to the non-public schools is inherently limited by the passage of time. In addition denial of relief would further other constitutional interests. It would eliminate any risk of unconstitutional entanglement with non-public school personnel and public officials.

The District Court also pointed out the virtual futility of granting relief. The instructional materials and equipment would be of no benefit to the local school districts since they necessarily duplicate the materials and equipment already available in the public schools.

A trial court is vested with broad discretion in determining the scope and availability of equitable relief and the scope of appellate review of such relief is correspondingly narrow. *Lemon v. Kurtzman*, *supra*, 411 U.S. at 200.

The state defendants respectfully submit that the denial of relief by the District Court was a proper, if not the only proper, exercise of its discretion.

Plaintiffs in their Jurisdictional Statement have attempted to distinguish the *Lemon* case on two grounds. They claim that the payments of money did not constitute an impermissible aid to religion while the loan of instructional materials and equipment do constitute such aid. They also claim that the continuation of the loan constitutes a "new and independently significant" constitutional violation.

The state defendants recognize that this Court, in *Lemon*, did not decide whether or not the grant of public funds constituted an impermissible aid to religion. They submit, however, the non-recovery of inherently secular educational materials and equipment, which have, or eventually will, become obsolescent, constitutes no greater, if as great an, advancement of the sectarian purposes of non-public schools as a grant of money to such schools to reimburse them for secular educational services.

In both the *Cathedral Academy* and *Lemon* cases, the plaintiffs sought to enjoin the future payment of public funds to non-public schools. The basic difference between the cases was that the District Court in *Cathedral Academy* had enjoined the payment of such funds while the District Court in *Lemon* denied such relief. In *Cathedral Academy* the legislature attempted to overrule the injunction by enacting a new statute providing for the same payment of funds as reimbursement for expenses as a moral obligation. It was the enactment of the new statute that constituted a new and independent constitutional infringement.

The instant case is similar to *Lemon* in that the District Court refused to enjoin the loan of instructional materials and equipment. It differs from the *Cathedral Academy* case in that the state has not attempted in anyway to overrule or evade the ruling of this Court or the injunction of the District Court after remand.

The instant case also differs from both *Lemon* and *Cathedral Academy* in the relief requested. These plaintiffs are seeking not to enjoin the future loan of materials and equipment but to compel the return of materials and equipment previously loaned. No past payments were involved in *Cathedral Academy* and the plaintiffs in *Lemon* did not even seek the return of the money which had previously been paid.

The state defendants submit that the District Court properly weighed the competing interests involved and correctly determined that an injunction should not issue.

The District Court stated that the state defendants were not the most appropriate parties for achieving the physical return of the materials and equipment. Nothing in the Jurisdictional Statement detracts from the validity of that statement.

Plaintiffs allege that the State Auditor has the duty to audit the boards of education and that the State Board of Education has the authority to administer educational policies relating to educational materials and equipment; to prescribe systems of accounting; and require boards of education to file such reports as it may prescribe. This hardly constitutes authority for either the State Auditor or the State Board to recover possession of the instructional materials and equipment.

Plaintiffs do not even attempt to allege any authority on the part of the other state defendants.

The state defendants are also inappropriate parties for another reason. Plaintiffs are asking the court to compel these state officers to perform their official functions in a certain manner. When a plaintiff seeks such affirmative relief against an official, the suit is in effect one against the sovereign and is barred by the Eleventh Amendment. *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11 and 704 (1974).

Even if the suit is not considered as one against the sovereign, principles of equity and comity would preclude such an unwarranted interference with the state's administration of its own laws. *Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976).

The most inappropriate parties to this action, however, are the plaintiffs. Plaintiffs in effect are asserting the rights of the public school districts of this state. Generally a party will not be permitted to assert the rights of third persons. One reason is that the third person may not wish to assert his rights. He may believe that it is better not to assert them in view of the consequences likely to be entailed. 13 Wright, Miller & Cooper, *Federal Practice and Procedure*, 211-212; Section 3531. This might well be the reason that many, if not all, of the public school districts did not assert their rights in this case. They may believe that, even if they were to prevail on a replevin claim, it would not be economically advantageous to do so.

As the District Court explained, the materials and equipment loaned to the non-public school students duplicates materials and equipment already owned by the public school districts. The public school districts would, therefore, have no use for such materials and equipment in their own schools.

The only way the materials and equipment may be sold by the public school districts is by public auction after thirty days notice. R.C. 3313.41. The market for such materials and equipment is obviously limited. It is likely that the only interested buyers would be the non-public schools. Since no one would be bidding against those schools, the amount realized from the auction would be whatever the non-public schools were willing to pay. That amount might not be sufficient to justify the expense of the appraisal, the publication of notice and the auction.

The refusal of the local school districts to initiate replevin actions, therefore, might well represent their considered judgment that their time and resources might better be used for other purposes. The state defendants submit that it would be particularly inappropriate for a federal court to permit the plaintiffs to substitute their choice for that of the local school districts regarding how best to use their scarce resources to carry out their educational function. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 413 U.S. 1, 40-42 (1973).

CONCLUSION

For the reasons stated herein this appeal should either be dismissed or affirmed.

Respectfully submitted,

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